Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

JOHN STANTON

Petitioner

v

DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is respondent District of Columbia (DC) Court of Appeals constitutionally required to make rules for the DC Bar Board on Professional Responsibility (BPR) similar to rules of DC Government administrative agencies or else conduct *de novo* and not deferential review of BPR findings and recommendations?

2. May respondent interpret DC Bar disciplinary rules to require counsel and not the client personally to give voice to the decision to plead guilty in criminal prosecutions?

3. Does respondent's interpretation requiring counsel's advocacy for a client's decision to plead guilty override the attorney's First Amendment interests and subvert the client's Fifth Amendment right to voluntary self-incrimination?

4. Does respondent have inherent authority to require changes in views or beliefs as a criterion for reinstatement to the practice of DC law?

5. Does the doctrine of *ex post facto* application of law pertain to attorney discipline?

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OPINION, CITATION

This petition is for review of the DC Court of Appeals opinion sustaining the BPR dismissal of petitioner's DC Bar reinstatement action reported as *In re Stanton*, 757 A2d 87 (DC 2000).

JURISDICTION

Jurisdiction is under US Code §28-1257 for review of the 10 August 2000 DC Court of Appeals judgment and opinion made final by the 20 November 2000 order denying rehearing. A copy of the opinion and a reproduction of the text of the order are appended to this petition.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

US Constitution, Amendment I

"[There] shall [be] no law abridging freedom of speech."

US Constitution, Amendment V

"No person shall be deprived of . . . property without due process of law."

DC Bar Professional Conduct Rule 1.2(a)

"In a criminal case a lawyer shall abide by a client's decision after consultation with the lawyer as to a plea to be entered, whether to waive jury trial, and whether the client will testify."

DC Bar Professional Conduct Rule 1.3(a)

"A lawyer shall represent a client zealously and diligently within the bounds of the law."

SUPREME COURT OF THE UNITED STATES

JOHN STANTON
Petitioner

v

DC COURT OF APPEALS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DC COURT OF APPEALS

STATEMENT OF THE CASE

By summary adoption of BPR findings and recommendations respondent DC Court of Appeals ordered petitioner's indefinite suspension from the practice of DC law for "conduct stemming from his view of a lawyer's proper role in assisting clients with guilty pleas"[1] in criminal

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[1] *In re Stanton*, 757 A2d 87, 88 (DC 2000), Appendix at 1A. The conduct stemming from petitioner's "view of his role as a lawyer," *In re Stanton*, 470 A2d, 272, 281,(DC 1983), *cert denied* 466 US 972, 104 SCt 2347 (1984), included telling a judge hearing a guilty plea that he had advised the client pleading guilty that the plea disposition arranged and advocated by another attorney was "improvident and unwise," *Id* at 288, and defending another client who initiated a guilty plea but stopped when the judge set aside the plea disposition offered by the prosecutor "and the case went to trial," *Id* at 274. The BPR reported findings on allegations petitioner challenged on due process fair notice issues of vagueness and overbreadth but petitioner's challenge was not heard because the BPR ruled that "procedural due

prosecutions.

When petitioner first sought reinstatement respondent asked if he had changed his view, specifically whether "he would assume the role of an advocate for a client who desired to plead guilty,"[2] and denied reinstatement when petitioner said he would not. Because petitioner had not changed his view respondent ruled that he "refuses to acknowledge or appreciate the seriousness of his misconduct."[3]

When petitioner next sought reinstatement respondent expounded on the advocacy requirement, ruling further that the advocate must "articulate the guilty plea of a client in court and . . . convince a judge of the voluntariness of a guilty plea of a client."[4] Petitioner's efforts to persuade respondent that to require advocacy for guilty pleas is a policy of harmful folly were unsuccessful and reinstatement was denied.

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process protections . . . are inappropriate in the disciplinary system," *Id* at 285. The suspension order forced petitioner "to justify his readmission to active practice," *Id* at 281, in formal reinstatement proceedings.

[2] *Matter of Stanton*, 532 A2d 95, 97 (DC 1987). Respondent denied reinstatement when petitioner said he would not argue for acceptance of a guilty plea but for "the best possible sentence [i]f the plea is accepted," *Ibid.* Respondent treated the BPR recommendation to deny reinstatement as "entitled to great weight," *Ibid.*

[3] *Matter of Stanton*, 532 A2d at 97. One of respondent's DC Bar reinstatement criteria is "whether the attorney recognizes the seriousness of his misconduct," *Id* at 96.

[4] *In re Stanton*, 589 A2d 425, 426 (DC 1991), *cert denied* 502 US 1098, 112 SCt 1178 (1992). As in the first reinstatement proceedings respondent ruled that "petitioner is precluded from challenging the constitutionality of the earlier disciplinary proceedings," *Matter of Stanton*, 532 A2d at 96, because "principles of *res judicata* apply in bar discipline cases," *In re Stanton*, 589 A2d at 426, and gave "great weight," *Id*, to the adverse BPR findings and recommendation.

When petitioner next sought reinstatement he said he would assume the role of an advocate for any client who desires to plead guilty if the client "was able to announce his decision to plead guilty in open court"[5] or gave petitioner "a clear directive to initiate the plea,"[6] but respondent misrepresented the record by reporting that petitioner "also stated that no client would ever with proper regard for his interests choose freely and intelligently to plead guilty to any charged offense"[7] and used this misrepresentation to find petitioner unable "to draw workable distinctions between his philosophical beliefs and his ethical obligations to his clients"[8] as a reason to deny reinstatement.

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[5] *In re Stanton*, 682 A2d 655, 657 (DC 1996), *cert denied* 522 US 817, 118 SCt 67 (1997). Reapplying in more detail "principles of *res judicata*" against petitioner's *ex post facto* challenge to the suspension order respondent said petitioner "failed to raise," *Id* at 657, his due process challenges "in the disciplinary proceedings . . . that led to his suspension, *Ibid*, applying a waiver theory as well despite the DC Bar Counsel's admission that petitioner had challenged the allegations against him in the disciplinary proceedings by raising the due process issue of fair notice against the vague and overbroad applications of the disciplinary rules.

[6] *In re Stanton*, 682 A2d at 657. Petitioner "further refined his position," *Ibid*, by this willingness "to advocate for acceptance of his client's guilty plea if that is the course his client freely and intelligently chooses," *Id* at 658, from his original position that "he would not advocate on behalf of a client's guilty plea in any situation," *Id* at 656.

[7] *In re Stanton*, 682 A2d at 657. Respondent denied without comment petitioner's motion to amend its opinion to delete the misrepresentation. Respondent refers briefly to this and other misrepresentations as "judicial 'dishonesty,'" *In re Stanton*, 757 A2d at 88, Appendix at 2A.

[8] *In re Stanton*, 682 A2d at 658. Respondent depended on the BPR to consider petitioner's testimony and observe his demeanor "in order to gauge the compatibility between his philosophical beliefs and his obligations to advise and carry out the wishes of individual clients who may . . . want to plead guilty," *Ibid*. Respondent deferred to the BPR

When petitioner next sought reinstatement he again agreed to assume the role of an advocate for the guilty plea of any client who freely and intelligently chooses that course but respondent sustained the BPR's dismissal of his reinstatement petition as "insufficient or defective on its face as a matter of law"[9] because he "did not manifest in the instant petition that he recognized the seriousness of the misconduct for which he was disciplined"[10] but "adamantly believes that he has never engaged in any misconduct."[11]

Respondent's opinion in the latest reinstatement proceeding addresses for the first time some of the long ignored, disregarded, or evaded issues raised by petitioner's constitutional claims, including the claim that

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findings and recommendation against reinstatement as "entitled to great weight," *Id* at 660.

[9] *In re Stanton*, 757 A2d at 89, Appendix at 3A. The BPR reported to respondent as reasons for dismissal petitioner's beliefs recited in the reinstatement petition that "the construction of the disciplinary rules to require counsel's advocacy for guilty pleas is unconstitutional" and that "counsel should not assume the role of advocate for a client's guilty plea unless the client after consultation expressly requests such advocacy but that clients should speak for themselves in pleading guilty without pressure or persuasion from counsel."

[10] *In re Stanton*, 757 A2d at 89, Appendix at 3A. The BPR demands that petitioner change his view to "straightforward acceptance" of respondent's interpretation of the DC Bar disciplinary rules requiring advocacy for guilty pleas as an indispensable condition for reinstatement.

[11] *In re Stanton*, 757 A2d at 89, Appendix at 3A. When dismissing a reinstatement petition the BPR "assumes that the petitioner would be able to establish by clear and convincing evidence all of the material facts set forth in the petition," *Ibid*, including here all of the "constitutional infirmities," *Id* at 89, Appendix at 5A, *Matter of Stanton*, 532 A2d at 96, of petitioner's disciplinary and reinstatement proceedings.

"giving the [BPR] deference similar to that given administrative agencies is constitutionally infirm,"[12] the claim that respondent's "interpretation of the disciplinary rules as they pertain to assisting clients with guilty pleas violates both the attorney's First Amendment right to freedom of expression and the client's Fifth Amendment right against involuntary self-incrimination,"[13] and the claim that respondent "should revisit its clearly erroneous and manifestly unjust decision to adopt summarily the [BPR] recommendation to suspend petitioner from practice for *ex post facto* misconduct."[14]

Respondent has denied rehearing (Appendix at 9A) of these claims, making final another order denying reinstatement with the comment that "petitioner has not yet come to grips with the substance of the misconduct which led to his suspension and the repeated rejection by

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[12] ***In re Stanton***, **757 A2d at 91, Appendix at 7A. BPR proceedings "do not offer the same procedural protections as administrative agency proceedings,"** ***Ibid***, **but respondent says the BPR "is not an administrative agency and therefore not governed by the Administrative Procedure Act,"** ***Ibid***, **so respondent is not "constitutionally required to fashion [BPR] procedural rules after the APA or else conduct fact-findings *de novo*,"** ***Ibid***, **Appendix at 8A.**

[13] ***In re Stanton***, **757 A2d at 90, Appendix at 6A. Respondent interprets DC Bar Rules of Professional Conduct 1.2(a) ("In a criminal case a lawyer shall abide by a client's decision . . . as to a plea to be entered") and 1.3(a) ("A lawyer shall represent a client zealously") in tandem to "require that [counsel] advocate for his client's decision to plead guilty,"** ***In re Stanton***, **757 A2d at 90, Appendix at 7A. Respondent's interpretation "overrides the lawyer's First Amendment interests,"** ***Ibid***, **Appendix at 6A, with "no violation of the client's Fifth Amendment privilege once the client . . . has chosen to plead guilty,"** ***Id*** **at 91, Appendix at 7A.**

[14] ***In re Stanton***, **757 A2d at 89-90, Appendix at 5A. Respondent says "the doctrine of *ex post facto* application of law . . . does not pertain to attorney discipline, which is not punitive,"** ***Id*** **at 90, Appendix at 6A.**

the court and the [BPR] of his efforts to gain reinstatement."[15]

ARGUMENT

Petitioner's argument for review is that respondent has not yet come to grips with the BPR lawlessness that leads to novel and unique interpretations of the disciplinary rules resulting in petitioner's suspension for "philosophical beliefs concerning the ideal role of the defense attorney which might happen to differ from those of individual members of the profession"[16] comprising the DC Bar disciplinary regime. Respondent's opinion asserts license for BPR lawlessness overriding and vitiating constitutional provisions in guilty plea practice and excluding the *ex post facto* doctrine as "inappropriate" as procedural due process in the DC Bar disciplinary system.

Respondent's "consideration of [BPR] findings and recommendations is similar to [its] review of administrative agency decisions,"[17] but in composition and operations the

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[15] ***In re Stanton***, **757 A2d at 89, Appendix at 4A. Respondent explains that petitioner is not "being persecuted for his views,"** ***Id*** **at 88, Appendix at 1A, but for his "personal disagreement,"** ***Ibid***, **with respondent's interpretation of the disciplinary rules and that petitioner need not "repudiate [his] views,"** ***Id*** **at 89, Appendix at 4A, but only show how his "position has significantly changed,"** ***Ibid***, **in "a new reinstatement petition that meets the applicable requirements,"** ***Id*** **at 88, Appendix at 2A, foremost of which is to change his position on or view of his role as a lawyer in guilty plea proceedings.**

[16] ***Matter of Stanton***, **532 A2d at 102.**

[17] ***Matter of James***, **482 A2d 163, 169 (DC 1982),** ***cert denied*** **469 US 1038, 103 SCt 1429 (1983). On review of DC Government administrative agency actions respondent says, "An agency's findings of**

BPR is in no way similar to a duly constituted, properly operating DC Government agency. The BPR operates in secrecy with no public participation in official actions, BPR members take no oath to support the US Constitution, and the BPR factfinding process is fundamentally unfair as by design it "shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence."[18]

Respondent defends deferential review of the BPR's constitutionally infirm proceedings by asserting "inherent authority over members of the legal profession practicing in the District"[19] and relying on a US District Court statement that it "found nothing"[20] to suggest undue deference to the

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fact and conclusions of law must be affirmed if they are supported by substantial evidence," *District of Columbia v Davis*, 685 A2d 389, 393 (DC 1996), "we must defer to an agency's interpretation of the statute which it administers," *Ibid*, and "[w]e refrain from substituting our judgment in areas of expertise reserved for the agency," *Ibid*.

[18] BPR Rule 11.2. The BPR may be entirely arbitrary in recommending to respondent whatever it sees fit, disregarding legal defenses in disciplinary proceedings and allegations admitted, uncontroverted, or assumed to be true in reinstatement proceedings. DC Bar disciplinary respondents have no right to dismiss legally insufficient allegations against them, as petitioner found out when his "inappropriate" challenge was disregarded, but the BPR may dismiss reinstatement petitions for legal insufficiency.

[19] *In re Stanton*, 757 A2d at 91, Appendix at 7A. Respondent never denies that giving the BPR deference similar to that given administrative agencies is constitutionally infirm

[20] *In re Stanton*, 757 A2d at 91, Appendix at 8A. The district court indeed made no findings on petitioner's complaint against "the unduly limited review powers of [respondent] over the [BPR]," *Stanton v DC Court of Appeals*, 326 USAppDC 404, 408, 127 F3d 72, 76 (1997), *cert denied* 519 US 1142, 117 SCt 1018 (1997) *and mandamus denied* 525 US 808, 119 SCt 282 (1998) *and cert denied* 120 SCt 2007 (2000), but dismissed on the pretext of no standing. The DC Circuit took judicial notice of unspecified "facts of public record" to affirm the district court's refusal to find facts. See *Id*, DDC No. 95-1952, *aff'd* CADC No.

BPR. Respondent's recognition, however, of the fact that "the [BPR] does not follow the same procedures as District administrative agencies"[21] makes the deference indefensible.

BPR lawlessness is the source of respondent's interpretation of DC Bar disciplinary rules to require advocacy for guilty pleas, a requirement that simply reflects the prevalent interests, opinions, or predispositions of BPR members. By deferring to the BPR's interpretation of the disciplinary rules and refraining from substituting its judgment in the area of purported BPR expertise respondent has suspended petitioner and denied him reinstatement for his "personal disagreement"[22] despite his pledge "to comply with the unconstitutional requirement by constitutional means."[23]

99-7093 (1999) *cert denied* US No. 99-1588 (2000).

[21] *In re Stanton*, 757 A2d at 91, Appendix at 7A. The DC Administrative Procedure Act (DC Code §§1-1501 *et seq*) provides procedural protections for all "contested cases," *Id*, §1-1509, in which "legal rights, duties, or privileges of specific parties are required by any law . . . or by any constitutional right to be determined," *Id*, §1-1502(8). In *Matter of Thorup*, 432 A2d 1221 (DC 1981), respondent said, "Disciplinary proceedings are adversary, adjudicatory proceedings. In as much as they are concerned with property rights of respondent bar members due process safeguards must be observed. This means that procedural requirements analogous to those of other 'contested cases' must be observed in attorney disciplinary cases," *Id* at 1225, but now respondent asserts "inherent authority" to dispense with such procedural requirements or protections in DC Bar disciplinary and reinstatement proceedings.

[22] *In re Stanton*, 757 A2d at 88, Appendix at 1A. Respondent suspended petitioner by summary adoption of BPR findings and recommendations and in petitioner's reinstatement proceedings gives "great weight" to adverse BPR findings and recommendations. Respondent never cites any other precedent or authority for interpreting the disciplinary rules to require advocacy for guilty pleas.

[23] *In re Stanton*, 757 A2d at 89, Appendix at 3A. Compliance is not enough for reinstatement. Petitioner must repudiate his views or

For petitioner compliance with respondent's requirement would involve consultation to determine whether the client wants to plead guilty and if so whether the client wants to announce the decision personally, petitioner's preferred practice, or wants petitioner to articulate the guilty plea and convince the judge of the voluntariness of the plea. But under respondent's interpretation of the disciplinary rules "the lawyer is expected to give voice in court to the client's decision to plead guilty,"[24] not the client personally, because "there is no violation of the client's Fifth Amendment privilege once the client, after receiving advice, has chosen to plead guilty."[25]

Petitioner believes respondent's assurance that in counsel's advocacy for a guilty plea there is no violation of the client's right against involuntary self-incrimination

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change his position significantly to "straightforward acceptance" of advocacy for guilty pleas in principle to "recognize the seriousness of his misconduct" and satisfy respondent's reinstatement criterion.

[24] *In re Stanton*, 757 A2d at 90, Appendix at 6A. Respondent cites no rule of law or authority other than its own BPR-derived interpretation for this expectation but petitioner's preferred practice preserves voluntariness, "the long-standing test for determining the validity of a guilty plea," *Hill v Lockhart*, 474 US 52, 54, 106 SCt 366, 369 (1985), by the spontaneity of the client's announcement. Petitioner believes "the duty of defense counsel is to make certain that the plea is entered voluntarily," *United States v Crook*, 607 F2d 670, 672 (CA5 1979), and Rule 11(d) of the Federal and DC Rules of Criminal Procedure require any court hearing a guilty plea to determine voluntariness "by addressing the defendant personally in open court," not through counsel, to "expose the defendant's state of mind on the record through personal interrogation," *McCarthy v United States*, 394 US 459, 467, 89 SCt 1166, 1171 (1969). This determination may be undermined to the degree a court "resorts to assumptions," *Ibid*, based on representations and arguments of counsel.

[25] *In re Stanton*, 757 A2d at 91, Appendix at 7A.

assumes that the client makes a resolute, final, irreversible decision when in reality such difficult decisions are always subject to change, and the indecisive defendant suffering misgivings, reservations, and second thoughts may be coerced by counsel's advocacy but fear to offend the court by backing out of a plea agreement announced, articulated, and advocated by counsel.

By consultation with clients petitioner believes he can comply with respondent's requirements while preserving voluntariness in guilty pleas. Petitioner's experience indicates it is unlikely "that any client in fact would choose to have him be an advocate for guilt,"[26] and in that unlikely event the client's "clear directive to initiate the plea" is enough to allay his concern.

But the same assumption behind respondent's assurance that advocacy for guilty pleas does not violate the client's right to voluntary self-incrimination, the assumption that the client has made a final decision that obligates counsel "to fully represent his client, including doing what is necessary to assist . . . a client who has decided to plead guilty,"[27] drives respondent's demand that petitioner not only comply but change his view to "straightforward acceptance" of advocacy for guilty pleas. Although petitioner should be entitled to his "personal disagreement" with respondent's interpretation of the disciplinary rules and "free to criticize the state of the law"[28] respondent's

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[26] *In re Stanton*, 682 A2d at 659.

[27] *In re Stanton*, 757 A2d at 89, Appendix at 3A. Respondent never explains why advocacy is necessary if the prosecutor and the defendant have made a bargain and the defendant "is entitled to plead guilty unless the district court can articulate a sound reason for rejecting his plea," *United States v Maddox*, 310 USAppDC 379, 382, 48 F3d 555, 558 (1995).

[28] *In re Sawyer*, 360 US 622, 631, 79 SCt 1376, 1380 (1959). The First

interpretation of the disciplinary rules "overrides" his First Amendment interests, including "individual freedom of mind."[29]

Petitioner believes guilty pleas and confessions should be articulated personally to make voluntariness certain. Does respondent have "inherent authority" to require him not only to articulate and advocate for guilty pleas for clients but also to change his belief?

Respondent says petitioner has not indicated that he is prepared faithfully to abide by the disciplinary rules because he does not recognize the seriousness of the misconduct for which he was disciplined, "conduct stemming from his view of a lawyer's proper role in assisting clients with guilty pleas." Petitioner says he will not repeat the conduct, that he will not tell judges hearing guilty pleas of advice to clients not to plead guilty and that he will consult with care to make certain that any client who wants counsel's advocacy for his decision to plead guilty will have it, but respondent wants him to change his view as well to recognize the seriousness of his *ex post facto* misconduct.

Forcing petitioner to recognize misconduct "which

Amendment "prohibits a state from excluding a person from a profession or punishing him solely because he holds certain beliefs," *Ibanez v Board of Accountancy*, 512 US 136, 144, 114 SCt 2084, 2089 (1994). "[T]he amendment embraces two concepts – freedom to believe and freedom to act. The first is absolute," *Baird v State Bar of Arizona*, 401 US 1, 6, 91 SCt 702, 705 (1971), so "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from practicing law," *Id* at 8, 91 SCt at 707.

[29] *Wallace v Jaffree*, 472 US 38, 52, 105 SCt 2479, 2487 (1985). Petitioner is not persuaded that he should set aside his "philosophical concerns regarding advocacy for guilty pleas," *In re Stanton*, 682 A2d at 659, that to require counsel's advocacy for guilty pleas is unconstitutional (petitioner would not permit such advocacy) and that clients should speak for themselves in pleading guilty without pressure or persuasion from counsel.

no attorney could have foreseen would be deemed violative of [respondent's] disciplinary rules"[30] deprives him of his due process claim under the *ex post facto* doctrine, so respondent says the doctrine "does not pertain to attorney discipline, which is not punitive,"[31] just one more of the many "constitutional infirmities"[32] in respondent's DC Bar disciplinary process.

"The DC Bar, created by the DC Court of Appeals in 1972, is the second largest unified bar in the United States. The precipitating force for the DC Bar's creation was the legal community's desire to have a single organization that could uphold the ethical standards and rules of professional conduct."[33] This large, influential, important community's desire will be misdirected until respondent secures due process of law in the DC Bar disciplinary process, but the harmful effects of BPR lawlessness and pursuit of mind control depicted in this petition will persist and intensify.

Respondent is treated as a state court for certain

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[30] ***Matter of Stanton*, 532 A2d at 96. Respondent never shows how any client could be wronged, harmed, or prejudiced by petitioner's *ex post facto* misconduct.**

[31] ***In re Stanton*, 757 A2d at 90, Appendix at 6A. "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer," *In re Ruffalo*, 390 US 544, 550, 88 SCt 1222, 1226 (1968).**

[32] ***In re Stanton*, 757 A2d at 89, Appendix at 5A, *Matter of Stanton*, 532 A2d at 96. Respondent's application of the disciplinary rules against petitioner clearly "implicate the central concerns of the *ex post facto* clause: the lack of fair notice and governmental restraint," *Lynce v Mathis*, 519 US 433, 441, 117 SCt 891, 896 (1997), but respondent says, "Application of the disciplinary rules . . . presents no colorable due process issue," *In re Stanton* 757 A2d at 90, Appendix at 6A.**

[33] ***About the Bar* (February 2001) <http://www.-dcbar.org/-about_bar/index.html>. At this time the DC bar has "more than 73,000 members across the country," *Attorney Resources* (February 2001) <http://www.dcbar.org/attorney_resources/ index.html>.**

purposes but is in reality a subordinate court subject to supervisory power for such radical departures from accepted and usual proceedings. No further proceedings before respondent are necessary to clarify the questions presented as no factual ambiguities or uncertainties attend the dismissal of petitioner's reinstatement petition as "insufficient or defective on its face as a matter of law."[34]

CONCLUSION

The petition for review of respondent's appended opinion should be granted.

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[34] ***In re Stanton*, 757 A2d at 89, Appendix at 3A.**

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

District of Columbia Court of Appeals

No. 98-BG-1940

IN RE JOHN J. STANTON, PETITIONER.

On Petition for Reinstatement in the Bar of the District of Columbia Court of Appeals

(Argued December 6, 1999 Decided August 10, 2000)

John J. Stanton, petitioner, *pro se*.

Elizabeth A. Herman, Senior Assistant Bar Counsel, with whom *Leonard H. Becker*, Bar Counsel at the time the brief was filed, was on the brief, for respondent, the Office of Bar Counsel.

Before STEADMAN, FARRELL and RUIZ, *Associate Judges*.

PER CURIAM: Petitioner was suspended from practicing law in the District of Columbia in 1983, in part due to conduct stemming from his view of a lawyer's proper role in assisting clients with guilty pleas.[1] *See In re Stanton*, 470 A.2d 272 (D.C. 1983) (Stanton I) (366 day suspension); *In re Stanton*, 470 A.2d 281 (D.C. 1983) (Stanton II), *cert. denied*, 466 U.S. 972 (1984) (concurrent 60 day suspension). Since that time, petitioner has thrice attempted to establish fitness to resume practice but has each time been denied reinstatement due to doubt about

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[1] Petitioner asserts that he is being persecuted for his views, but, as we have emphasized repeatedly, our concern lies solely with his ability to act in accordance with our disciplinary rules despite personal disagreement with them. *See In re Pierson*, 690 A.2d 941, 948 (D.C. 1997) ("The purpose of imposing sanctions, after all, is not to punish the attorney but to protect the public and the courts, to maintain the integrity of the profession, and to deter other attorneys from engaging in similar misconduct.").

his willingness to conform his conduct to the disciplinary rules as interpreted by this court. *See In re Stanton*, 682 A.2d 655 (D.C. 1996) (Stanton V) (third petition), *cert. denied*, 522 U.S. 817 (1997); *In re Stanton*, 589 A.2d 425 (D.C. 1991) (Stanton IV) (second petition), *cert. denied*, 502 U.S. 1098 (1992); *In re Stanton*, 532 A.2d 95 (D.C. 1987) (Stanton III) (first petition).[2] Now before us is a fourth petition for reinstatement, dismissed by the Board on Professional Responsibility ("Board") as insufficient on its face, but without prejudice to the filing of a new petition that meets the applicable requirements. We sustain the Board's dismissal.

I.

The petitioner in a reinstatement case bears the burden of proving by clear and convincing evidence that he or she is fit to resume the practice of law. *See In re Roundtree*, 503 A.2d 1215, 1216 (D.C. 1985); D.C. Bar R. XI, § 16(d). This court outlined five factors critical to the reinstatement decision in *Roundtree, supra*: (1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law. *See* 503 A.2d at 1217. With these factors in mind,[3] the

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[2] Petitioner alleges that this court erred factually in one or more of its previous *Stanton* opinions and demands that we order the Board to investigate this judicial "dishonesty." The court has dealt with any purported errors of law or fact in prior decisions that have been brought to its attention by means of a petition for rehearing filed pursuant to D.C. App. R. 40. Concerns petitioner has about judicial conduct are within the purview of the District of Columbia Commission on Judicial Disabilities and Tenure, D.C. Code §§ 11-1521 to 1530 (1995).

[3] Board Rule 9.1 expressly requires that a petition for (continued...)

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Board may dismiss a petition without a hearing if the petition is "insufficient or defective on its face" as a matter of law. *See* D.C. Bar R. XI, § 16(d). In applying this standard, the Board uses an approach similar to that of a trial court considering summary judgment, *i.e.* it assumes that the petitioner "would be able to establish by clear and convincing evidence all of the material facts set forth in the petition." Board Rule 9.2.

Petitioner did not manifest in the instant petition that he recognized the seriousness of the misconduct for which he was disciplined; that is, he did not indicate that he was prepared faithfully to abide by the disciplinary rules applicable to members of the bar, for the breach of which he was sanctioned. If anything, the petition, as well as petitioner's exceptions to the Board's order and his briefs to this court, indicate that petitioner adamantly believes that he has never engaged in any misconduct. For example, he states, "The history of the disciplinary actions against petitioner is a series of his efforts to comply with the unconstitutional requirement by constitutional means." This statement aptly captures petitioner's inability to accept that, regardless of his personal beliefs, he must conduct himself in accordance with our interpretation of the disciplinary rules as requiring him to fully represent his client, including doing what is necessary to assist (and not to impede) a client who has decided to plead guilty. In light of appellant's failure to make allegations sufficient to satisfy a critical *Roundtree* factor, we must agree with the Board that the instant petition is insufficient as a matter of law. Moreover, a hearing is not necessary because, as we explained in *Stanton IV*:

> [I]f petitioner's understanding of his ethical duty is exactly the same . . . then he has

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[3](...continued)
reinstatement allege "material facts" that "specifically address" the five *Roundtree* requirements.

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> had a full and fair opportunity to offer that understanding in satisfaction of the *Roundtree* standard, and he will not be heard -- by a division of the court -- to do so again. Otherwise petitioner could continually apply to the court for reinstatement while adhering to an understanding of his obligation which the court has found contrary to the duties imposed by the canons of ethics on an attorney representing a criminal defendant.

Stanton IV, *supra*, 589 A.2d at 426.[4]

In short, as the Board noted in the penultimate paragraph of its dismissal order, "[w]e believe that Petitioner has not yet come to grips with the substance of the misconduct which led to his suspension and to the repeated rejection by the Court and the Board of his efforts to gain reinstatement."

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[4] Petitioner contends that the Board's acting without a hearing indicates that we are no longer interested in his achieving "'compatibility' between [his] philosophical views and the disciplinary rules," but rather demand that he repudiate those views. This is simply not true. The point of a hearing is to explore material issues raised in the petition in more detail. No hearing was necessary here precisely because petitioner failed to raise any issues not already explored.

In reaching our decision, we rely solely on the assertions contained in the petition. Although petitioner suggests that we should also consider his views as expressed at oral argument, the function of oral argument is to explore legal issues and the facts that are of record, not to make factual findings or provide an opportunity for petitioners to supplement deficient petitions. If petitioner's position has significantly changed since he filed the instant petition, then he is of course free to file a new petition in which he addresses the *Roundtree* factors and explains how his position has changed, as the Board's order dismissing this petition plainly permits.

II.

In addition to contesting dismissal of his fourth petition, petitioner argues that we should vacate or rescind the original 1983 order suspending him because of constitutional infirmities. Principally, petitioner argues that this court should "revisit[] its clearly erroneous and manifestly unjust decision to adopt summarily the [Board] recommendation to suspend petitioner from practice for *ex post facto* misconduct."

We decline to "revisit" the court's decisions suspending petitioner. The purpose of a reinstatement proceeding is not to reconsider the underlying disciplinary proceeding, but to evaluate the petitioner's "present qualifications and competence" to practice law. *Roundtree, supra*, 503 A.2d at 1218. *See Stanton V, supra*, 682 A.2d at 657 n.4 ("we will not revisit the disciplinary proceeding in this reinstatement case"). Petitioner's constitutional arguments are clearly barred by *res judicata* and prior rulings of this court. *See Stanton III, supra*, 532 A.2d at 96 ("petitioner is precluded from challenging the constitutionality of the earlier disciplinary proceedings and dispositions of this court"); *see also Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999) (stating that the doctrine of res judicata "operates to bar in the second action not only claims which were actually raised in the first, but also those arising out of the same transaction which could have been raised"). By adopting the Board's recommendation, this court rejected petitioner's constitutional arguments. *See Stanton II, supra*, 470 A.2d at 287-88; *see also id.* at 282 n.2 ("We also agree with the Board that respondent's contentions concerning certain improprieties in the conduct of his disciplinary proceedings are similarly without merit."). Another panel of this court having addressed and rejected petitioner's arguments, we are not at liberty to consider them anew. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

We have no difficulty, however, explicating why the court summarily rejected his constitutional arguments.

When petitioner refers to suspension for *ex post facto* misconduct, we understand him to reference his argument in the original disciplinary proceedings based on *In re Ruffalo*, 390 U.S. 544 (1968).[5] In his brief to the court in *Stanton II*, quoting *Ruffalo*, petitioner argued that a court should not "deprive an attorney of the opportunity to practice his profession on the basis of a determination *after the fact* that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 556 (emphasis added). Whatever the subjective good faith of petitioner's beliefs, he simply cannot have maintained an objectively founded view that in representing a criminal defendant who desires to plead guilty, "he is entitled actively to attempt to thwart [the] client's desires . . . or to stand by and allow his client to flounder without his assistance . . . ." *Stanton I*, *supra*, 470 A.2d at 278. Application of the disciplinary rules to prohibit this manner of deliberate neglect of a client's lawful objectives presents no colorable due process issue.

We similarly rejected petitioner's unsupported assertion that our interpretation of the disciplinary rules as they pertain to assisting clients with guilty pleas violates both the attorney's First Amendment right to freedom of expression and the client's Fifth Amendment right against involuntary self-incrimination. Once a lawyer undertakes to represent a client, Rule 1.3 of the Rules of Professional Conduct, like DR 7-101(A)(1) of the Code of Professional Responsibility before it, requires the lawyer to represent the client "zealously," and prohibits the lawyer from failing to "seek the lawful objectives of [the] client." These obligations to the client override the lawyer's First Amendment interests where the lawyer is expected to give voice in court to the client's decision to plead guilty, not to

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[5] We note that the doctrine of *ex post facto* application of law, to the extent petitioner relies on it, by itself does not pertain to attorney discipline, which is not punitive. *See, e.g., Carmell v. Texas*, __ U.S. __, 120 S.Ct. 1620, 1627-29 (2000) (defining doctrine).

express his or her own opinion. For the same reason, there is no violation of the client's Fifth Amendment privilege once the client, after receiving advice, has chosen to plead guilty. What the rules require is that petitioner advocate for *his client's decision* to plead guilty, not for guilty pleas generally, which the lawyer might find objectionable.

Petitioner also challenged the deference we give to the Board's factual findings and recommendations. *See, e.g., In re Fogel*, 679 A.2d 1052, 1054 (D.C. 1996) ("Although the ultimate decision on whether an attorney is reinstated is ours alone, the Board's findings or recommendations in this regard are entitled to great weight.") (citation omitted); *In re James*, 452 A.2d 163, 169 (D.C. 1982) ("Our consideration of Board findings and recommendations is similar to our review of administrative agency decisions."), *cert. denied*, 460 U.S. 1038 (1983). Petitioner argues that giving the Board deference similar to that given administrative agencies is constitutionally infirm because Board proceedings do not offer the same procedural protections as administrative agency proceedings.

As explained in the Preamble to the Bar Rules, this court created the Board in the exercise of its inherent authority over members of the legal profession practicing in the District. *See also* D.C. Code § 11-2501(a) (giving this court statutory authority to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion"). One of the functions of the Board is to conduct the fact-finding necessary to our evaluation of disciplinary matters. *See* D.C. Bar R. XI, § 4(e). While it is true that the Board does not follow the same procedures as District administrative agencies, the Board is not an administrative agency and therefore not governed by the Administrative Procedure Act (APA), D.C. Code §§ 1-1501 to 1542 (1999). Ignoring this fact, and citing no authority, petitioner nonetheless

contended that we are constitutionally required to fashion Board procedural rules after the APA, or else conduct fact-findings *de novo*.[6] Finding no basis for this contention, we rejected petitioner's argument.

The Board's order dismissing the petition for reinstatement is

Sustained.

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[6] We note that the United States District Court for the District of Columbia recently stated in *Stanton v. District of Columbia Court of Appeals*, No. 95-1952 (D.D.C. April 28, 1999), that it found nothing to suggest that this court gives undue deference to the Board.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-BG-1940 **NOV 20 2000**

IN RE: JOHN J STANTON,

Petitioner

BDN: 288-98

BEFORE: **Wagner, Chief Judge; **Terry, *Steadman, Schwelb, *Farrell, *Ruiz, Reid, **Glickman, and Washington, Associate Judges.**

ORDER

On consideration of petitioner's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

****Associate Judges Terry and Glickman have recused themselves from this case.**